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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 444

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM AND WILLIAM C. BLOOM,
Petitioners,

vs.

RKO RADIO PICTURES, INC., A CORPORATION, LOEW'S, INCORPORATED, A CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION, PARAMOUNT PICTURES, INC., A CORPORATION, BALABAN & KATZ CORPORATION, A CORPORATION, VITAGRAPH, INC., A CORPORATION, WARNER BROS. PICTURES, INC., A CORPORATION, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION, AND WARNER BROS. THEATRES, INC., A CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	PAGE
Petition	1
Jurisdiction	2
Opinion Below	2
Summary Statement of the Matter Involved	2
Question Presented	8
Reasons for Granting the Writ	8
Prayer	9
Brief	11
Statement of the Case	11
Jurisdiction	12
Opinion Below	12
Specification of Errors	12
Argument	13
Conclusion	19

Citations.

Cases.

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 376-7 ..... 8, 9, 15, 16

Package Closure Corp. v. Sealright Co., 141 F. 2d 972, 979 ..... 8, 18

Palmer v. Connecticut Railway & Lighting Co., 311 U. S. 544, 560 18

Rankin Co., Wm. H. v. Associated Bill Posters Asso., 42 F. 2d 152, 155 ..... 8, 17

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 563, 565, 566 ..... 8, 9, 14, 19

Tennant v. Peoria & Pekin Ry. Co., 321 U. S. 29, 35-6 ..... 17, 19

Statutes and Miscellaneous.

Section 240(a) Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 USCA § 347(a) 2

Section 4 of the Clayton Act, 38 Stat. 731, 15 USCA § 15 2

Sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210, 15 USCA § 1, 2 and 15 ..... 2, 13

Hamilton, Antitrust in Action, T.N.E.C. Monograph No. 16, pp. 103-4 13

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PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Florence B. Bigelow, Marion B. Koerber, John E. Bloom and William C. Bloom, respectfully pray that a writ of certiorari may issue to the United States Circuit Court of Appeals for the Seventh Circuit

to review a judgment of that court reversing a judgment of the district court for $360,000 and costs entered upon a verdict for petitioners in a treble damage suit brought by them under the antitrust laws. The verdict had found respondents guilty of an illegal price-fixing conspiracy which proximately caused $120,000 of damage to petitioners' motion picture theatre business.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 USCA § 347(a).

The judgment of the circuit court of appeals was entered on August 3, 1945 (R. 2275).

Opinion Below.

The opinion of the circuit court of appeals appears in the record at page 2263. It has not yet been reported. The district court filed no opinion.

Summary Statement of the Matter Involved.

Petitioners brought this suit under Sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210, and Section 4 of the Clayton Act, 38 Stat. 731, 15 USCA §§ 1, 2 and 15, for an injunction and to recover threefold damages. The complaint was that respondents maintained a monopoly and price-fixing conspiracy as a result of which petitioners' Jackson Park Theatre, on the south side of Chicago, was prevented from showing motion pictures until after they had been shown in respondents' competing theatres (R. 6-12).

After a trial lasting four weeks the jury returned a

verdict of guilty and assessed damages at $120,000 (R. 2125). The district court overruled respondents' motions for a new trial and for judgment non obstante veredicto and entered judgment on the verdict (R. 2199). This judgment was reversed solely on the ground that petitioners did not prove earnings in an "open market" for comparison with what they earned under the illegal system (R. 2272) although such proof was impossible because respondents by their illegal conspiracy had made an "open market" non-existent for fifteen years prior to the suit (R. 540, 708).

The application for injunctive relief is still pending in the district court under an order which permits either side to bring it on for hearing on five days' notice (R. 2096). The reviewing court, without any jurisdiction over the equity side of the case, says that petitioners "abandoned this request after verdict and relied upon the money judgment" (R. 2271).

Respondents are the major producers, distributors and exhibitors of motion pictures in the United States. Petitioners proved that respondents maintained in the Chicago District by conspiracy among themselves an illegal system of distributing motion pictures for showing in successive weeks of release (R. 2265, 2266, 2270).

This system was designed "primarily" to benefit a so-called Loop or first run in the downtown entertainment district of Chicago (R. 936-7) in which new pictures were shown exclusively in theatres owned by respondents Balaban & Katz Corporation and RKO Pictures, Inc. (R. 368, 369, 424, 1637-1640). No other theatre in the entire Chicago District could show those pictures until three weeks after the conclusion of the Loop run (R. 1637-1640). The system then provided for showings in successive weeks, called A pre-release, B pre-release and C pre-release, and weeks of general release. The A run comprised the fourth, fifth

and sixth weeks following the Loop run and in it pictures could be shown only in A pre-release theatres, all of which were owned by respondents Balaban & Katz and Warner Bros. (R. 1595, 2065, 1763, 1764). The B run comprised the seventh and eighth weeks and the C run the ninth week following the Loop run (R. 370-6).

After the C run came weeks of general release. Under respondents' system petitioners' theatre was arbitrarily assigned a playing position ten weeks after the conclusion of the Loop run (R. 148, 1643). It could not even bid for, much less obtain, pictures for exhibition at an earlier date (R. 142, 147, 148, 153, 154, 155, 291, 985). Petitioners were thereby prevented from showing pictures until after they had been shown in all of respondents' comparable and competing theatres (R. 944, 1642, 1643, 1729, 2014). The Jackson Park Theatre was comparable in all respects with the B & K Maryland and the Warner Jeffery, its chief competitors (R. 164, 165, 243, 1139-1143, 1132-1136).

Petitioners had nothing to do with the creation or operation of the system (R. 172, 962) and could not buy pictures from respondent distributors except under standard forms of printed contracts (R. 202-203, 649). As an integral part of the system respondents fixed minimum admission prices in the different runs and undertook to forfeit the right to exhibit pictures if such prices were not maintained (R. 199, 200, 351, 375, 396, 716, 735, 839, 900).

Respondent distributors received under percentage contracts (R. 351, 371, 679, 824, 908) as much as 70% of the net receipts of the Loop run theatres (R. 1615) in which Balaban & Katz and RKO had a monopoly (R. 368, 369, 1637-9). Respondents' witnesses testified that the purpose of withholding pictures from the subsequent run neighborhood theatres was to suppress their competition and thus induce patrons of the neighborhood theatres to attend the Loop theatres which charged the highest admission prices

(R. 352, 370, 371) and in which all respondents were sharing.

The jury, the district court and the circuit court of appeals (R. 2270) all found that the system was illegal and the latter court held that "if as a proximate result of it plaintiffs were damaged thereby, they would be entitled to recover for such damage to themselves as they had proved under such theory or theories upon which they relied" (R. 2271).

Prior to 1937 respondents exhibited only single features in their theatres (R. 144, 145, 211, 849, 854, 174). This practice enabled the Jackson Park Theatre, then owned by petitioners' parents but operated by the same manager as petitioners employed (R. 131), to obtain free of the restrictions of the illegal system some pictures which had not already been shown in respondents' competing theatres (R. 174, 211). By August of 1937 all of respondent exhibitors had instituted a double feature policy in their theatres (R. 1085-7) and thereby were able to license twice as many pictures under the illegal system with the result that no longer were any pictures available to petitioners free of the restrictions which the respondents imposed (R. 144, 174).

The illegal nature of respondents' double featuring, and its effect on petitioners' business, were described by the reviewing court as follows:

> "Appellants contend that there was no evidence which supports the general finding of the jury that double features were introduced by them as a part of their conspiracy, as alleged. What we have heretofore said with respect to proof of conspiracy need not be repeated. It is sufficient to say that neither the sale nor use of double features is illegal *per se*, but if the sale or use is a part of an illegal conspiracy, such as here alleged, every element used for the purpose of accomplishing the intended result of such illegal conspiracy becomes tainted with illegality. It is the intended result of such use which renders it il-

legal, not the thing *per se*, nor its use without such intended result.

"The record discloses that prior to the use of double featuring, plaintiffs' theater was always able to buy some product that had not already been shown by defendants' theaters, and this was available free of the restrictions of the Chicago system of release. That product was taken away by defendants' prior contracts, made pursuant to and as a part of the conspiracy, and placed under the restriction of the illegal system, and thereafter was not obtainable by plaintiffs, except by use of the illegal system. The general verdict of the jury, in effect, finds this evidence to be true, and we cannot disturb it." (R. 2274.)

As to the proof of resulting damages the reviewing court said:

"One method of attempting to prove damages was by a comparison of the average profit of plaintiffs' theater during a four-year period preceding July 28, 1937, with its lessened profits during the five years immediately following that date. The difference was in excess of $120,000 *and such evidence if pertinent would support the verdict under the first theory.*" (R. 2269.) (Italics supplied.)

The evidence referred to was uncontradicted and unimpeached and reflected the calculation of an accountant from the books and income tax returns of the Jackson Park Theatre (R. 475). The average used as a standard for comparing subsequent earnings was $44,000 a year (R. 476) *and represented earnings made in petitioners' theatre prior to the time that exhibitor respondents were all using double features in their competing theatres* (R. 1085-7). This figure, projected through the years complained of, shows that the theatre should have earned at least $220,000. It actually earned $94,340.01 (R. 476) so that the difference of $125,659.99 represented the loss attributable to the extension of the illegal system through double featuring (R. 144).

Thus the sole question left in the case is whether evidence which compared earnings under single features with earnings under double features was pertinent. The reviewing court held this evidence irrelevant on the ground that the only proof of damages which could be used was the difference between what the theatre earned under the illegal system and what it earned in an open market (R. 2272).

Since the illegal system had wholly monopolized the Chicago District for fifteen years (R. 540, 708, 141-3, 146-9, 151-6, 203, 287, 294), *respondents' acts made impossible any proof of earnings in any theatre in an open market which could be used to make the comparison required by the reviewing court.*

Richard Salkin, who had managed the Jackson Park Theatre since 1927 (R. 131), testified that the decline in the theatre's earnings was due solely to respondents' extension of the illegal system through double featuring (R. 174) in the period complained of. The jury found that this extension of the illegal system proximately caused the decline in profit of the Jackson Park Theatre and the reviewing court says that "such evidence if pertinent would support the verdict". (R. 2269.)

In holding that such proof was immaterial and in stating that only "open market" earnings could be used as a basis for comparison the reviewing court has in effect granted to respondents a vested interest in their own illegal system of distribution. The public interest involved is apparent because an illegal conspiracy which has been held to constitute a violation of the antitrust laws, and which prevents any theatre from making any earnings in an "open market", *must be continuously maintained by respondents in order to prevent the recovery of damages by their victims.*

Question Presented.

Do the antitrust laws grant immunity from a treble damage suit on the ground that damages cannot be proven with certainty where

(a) Respondents by violation of those laws have destroyed an open market in the distribution of motion picture film for a long enough time to prevent petitioners from comparing the profits of their theatre in such a market with its earnings under the illegal system of release, and where

(b) Petitioners proved a decrease in the profits of their theatre caused by respondents' illegal double featuring sufficient in amount to support the verdict of the jury?

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The circuit court of appeals held that the only permissible proof of damages was a comparison between net profits in an open market with what petitioners earned under respondents' illegal system, even though respondents had destroyed such open market. This decision is in direct conflict with the decisions of this Court in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 and *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359.

2. The decision is also in direct conflict with the rule announced by the Circuit Court of Appeals for the Second Circuit in *Wm. H. Rankin Co.* v. *Associated Bill Posters Asso.*, 42 F. 2d 152, and *Package Closure Corp.* v. *Scalright Co.*, 141 F. 2d 972.

3. The substitution by the circuit court of appeals of its own inferences and conclusions for those of the jury, on the questions of the proximate cause and amount of

petitioners' damages, deprived petitioners of their constitutional right to a jury trial, and is in direct conflict with the decisions of this Court in *Tennant* v. *Peoria & Pekin Ry. Co.*, 321 U. S. 29, *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, and *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359.

4. The circuit court of appeals has decided an important question of Federal law in a manner which in effect deprives the public of the benefit of civil suits under the antitrust laws and tends to encourage a violation of those laws. The consequent injury to the public is so manifest as to call for the exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

THOMAS C. MCCONNELL,
HULBERT VAN HOOK,
Attorneys for Petitioners.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari.

Jurisdiction.

The jurisdiction of this Court is shown in the accompanying petition.

Opinion Below.

The opinion of the circuit court of appeals is found at page 2263 of the record.

Specification of Errors.

If a writ of certiorari is issued, petitioners intend to urge that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In setting aside a jury's verdict fixing petitioners' damages at $120,000 on the ground that there was no proof of those damages.

2. In stating that petitioners had abandoned their application for an injunction, when the record shows that the district court has retained jurisdiction over the equity branch of the case.

ARGUMENT.

I.

The Circuit Court of Appeals Has Decided an Important Question of Federal Law in Conflict With the Decisions of This Court, and Has Departed So Far From the Accepted Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

Under Section 7 of the Sherman Act a private litigant is entitled to recover threefold the damages by him sustained for any violation of that Act which has injured his property or business. The manifest purpose of this section is to promote the public interest in the suppression of monopolies and illegal price-fixing conspiracies. See Hamilton, Antitrust in Action, T. N. E. C. Monograph No. 16, pages 103-4, where it is stated:

> "The shift to a civil action improves the weapon • • • makes substantial damages a term in the businessman's equation • • • in a word it attempts to make restraint of trade a bad business risk."

In the instant case it is apparent that the decision of the circuit court of appeals in effect encourages respondents' monopoly and illegal suppression of competition. It is equally apparent that *the judgment entered in the district court, if affirmed, would end respondents' illegal method of distributing and exhibiting motion pictures.*

Here the public interest is directly affected by a conspiracy under which the public is mulcted of high admission prices artificially maintained by illegally preventing the early showing of pictures except in respondents' own theatres at high admission prices. The public is thus

forced to wait long intervals of time to see pictures anywhere but in respondents' theatres. *There was very little patronage left by the time the pictures reached the Jackson Park Theatre* (R. 261). The consequent "fact of damage" to petitioners and to the public is obvious and identical. In effect, the decision places a premium upon a violation of the antitrust laws which is unique in this country's jurisprudence. The more complete and effective such violation becomes the more certain the immunity from the treble damage section of the Sherman law. Followed step by step, the conspiracy described in the reviewing court's opinion and characterized by it as illegal becomes a blueprint for immunity under the law. Since the same system is carried on by respondents throughout the United States (R. 682) an entire industry is in effect thus given exemption from civil suits under the Sherman law. The reviewing court has thus created a precedent which if not reversed points the way for future violations of the antitrust laws contrary to the spirit, intent, philosophy and public policy expressed in the Sherman and Clayton Acts.

This decision is in direct conflict with the decision of this Court in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555. In that case this Court stated (p. 563):

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only

> approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. * * * As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party."

This Court then says (p. 565):

> " 'Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced; * * *
>
> " 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.' "

The decision of the reviewing court is also in direct conflict with the decision of this Court in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359. In that case, in computing damages the basis used for comparison was not "open market" earnings but earnings made during a time when the plaintiff was buying and selling under the terms of the defendant's illegal monopoly. The defendant, as here, contended (pp. 376-377):

> "that there was a lack of competent proof of such damages in that the profits earned by the plaintiff during the preceding four years in which it had been a customer of the defendant, were improperly used as a standard by which to measure the damages sustained by the plaintiff during the period covered by the suit, since during such preceding years it had participated in the defendant's unlawful acts in furtherance of the monopoly and was *in pari delicto*."

This Court there held that the jury used a proper standard. The reviewing court here in its opinion (R. 2272)

attempts to distinguish the Eastman case on the ground that this Court said there was evidence

> "tending to show that under such plan the dealers' profits did not exceed those on the sale of goods of other manufacturers not parties to the monopoly."

In the instant case the proof shows that petitioners were not participating on an equal plane with respondents. Instead, petitioners were the victims of a conspiracy designed and intended to keep film away from them until after it had been shown in respondents' theatres, and by thus suppressing all competition by petitioners and other independent theatres, respondents were able to maintain high fixed admission prices in their own theatres. Having found petitioners the victims of such a conspiracy, it would have been a contradiction in terms for the jury to find that petitioners could have made more money under that system than they could in an open market. Richard Salkin, the petitioners' witness, testified that the theatre would have done twice as much business under conditions of open competition (R. 263). Further, the reviewing court ignored the uncontradicted evidence that in the earlier period petitioners' theatre made more money because an open market was partly approximated in that under single featuring there were still some pictures available to the Jackson Park Theatre outside the restrictions of the illegal system. Any further proof along the line suggested in the reviewing court's quotation from the *Eastman* case was precluded by the respondents' unlawful destruction of an open market for all theatres in Chicago.

Under the present decision, petitioners and some three hundred independent motion picture operators in the Chicago District are condemned to do business under the illegal system, unable to better their lot or to sell their film exhibition to the public at competitive prices. The ques-

tion thus presented is not merely of interest to the litigants but of paramount importance to the general public, which, until the circuit court of appeals had formulated an impossible comparison of earnings as a condition to recovery and thereby reversed the judgment, would have received very material benefits under the decision by the jury. In this situation we urge that a proper occasion has arisen for the exercise of the supervisory power of this Court.

II.

The Decision of the Circuit Court of Appeals Requiring Proof of Open Market Earnings Where Such Proof Is Precluded by the Defendants' Wrongful Acts Is in Direct Conflict With the Decisions of the Circuit Court of Appeals for the Second Circuit.

The reviewing court discarded the testimony of Richard Salkin that petitioners' theatre could have done twice as much business in an open market (R. 263) and said it was "a mere guess" (R. 2273).

In the case of *Wm. H. Rankin Co.* v. *Associated Bill Posters Asso.*, 42 F. 2d 152, the Circuit Court of Appeals for the Second Circuit approved proof of damages which consisted of an estimate of "what he (the plaintiff's treasurer) considered would have been the normal increase of this plaintiff's business from year to year." The court stated (p. 155):

> "The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damages it has suffered. *This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted.* It had to do with what was never actually earned because of the defendants' wrongdoing." (Italics supplied.)

In *Package Closure Corporation* v. *Sealright Co.*, 141 F. 2d 972, the same court said (page 979) if it was necessary to prove what the defendant's wrongdoing had precluded proving in order to recover any damages "* * * that the more grievous the wrong done to the plaintiff by the defendant, the less likelihood there would be of a recovery."

III.

The Decision of the Circuit Court of Appeals in Substituting Its Inferences and Conclusions for Those of a Jury on the Questions of Proximate Cause and Amount of Damages Is in Direct Conflict With the Decisions of This Court.

The circuit court of appeals holds that the undisputed evidence is that petitioners neither operated nor assisted in operating any theatre prior to their ownership of the Jackson Park Theatre and that this fact would prove only that matters other than the illegal Chicago system had proximately caused the damages assessed by the jury (R. 2272). As we have pointed out, the uncontradicted evidence was that the Jackson Park Theatre was managed by Richard Salkin both before and during petitioners' ownership. In *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U. S. 544, this Court said (p. 560):

> "* * * different methods of operation or normal changes in the executive staffs do not seem sufficient to interfere with the probative value of past experience."

Salkin, with a most intimate knowledge of the entire business, assigned the loss of earnings to the illegal system and to its greater impact on the theatre's business under the illegal double featuring (R. 174). His testimony was uncontradicted. The jury followed it.

The reviewing court discards the jury's conclusion based on uncontradicted testimony and substitutes its own. In so

doing it is in direct conflict with the decision of this Court in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, where this Court stated (p. 566):

> "But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body."

The reviewing court's decision on this issue is also in conflict with the case of *Tennant* v. *Peoria & Pekin Ry. Co.*, 321 U. S. 29, where this Court stated (pp. 35-36):

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Conclusion.

The ruling of the Circuit Court of Appeals for the Seventh Circuit in the case at bar is manifestly erroneous and against public policy. The questions presented are of paramount public importance. In conflict with the decisions of this Court and of another circuit court of appeals, a jury verdict vindicating large public interests has been set aside by the imposition of an arbitrary rule of damages. It is, therefore, respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

THOMAS C. MCCONNELL,
HUBERT VAN HOOK,
Attorneys for Petitioners.